

STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF ENERGY, MINERAL AND LAND RESOURCES

REPORT OF PROCEEDINGS OF PUBLIC HEARING AND COMMENT PERIOD

PERMANENT RULE READOPTION
WITH AMENDMENTS IN 15A NCAC 02K .0212
“ADDITIONAL DESIGN REQUIREMENTS”

SEPTEMBER 13, 2018
RALEIGH, NORTH CAROLINA

ENVIRONMENTAL MANAGEMENT COMMISSION

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I. Summary and Recommendation

A. Background and Summary

In the statutorily-required, Periodic Review of Existing Rules, the "initial determination" of the 33 Dam Safety rules in 15A NCAC Subchapter 02K were approved for finalization by the Environmental Management Commission (EMC) at their May 2017 meeting. Although no one objected to the categorization of these rules, the staff did receive one comment on 15A NCAC 02K .0212 stating that: "The reference to G.S. 143-215.25(4) should be G.S. 143-215.25(2)." The Rules Review Commission (RRC), in October of 2017, determined that the comment received was an "objection" and they re-categorized this rule as "necessary with substantive public interest." This means that the EMC was required to re-adopt this rule pursuant to G.S. 150B-21.3A and update the incorrect statutory reference

Paragraphs (2) and (3) of G.S. 143-215.25 had been deleted by the General Assembly in 1993 which left the Commission's rule language inaccurate. However, because the entire rule had to be reviewed by the RRC, the DEMLR staff asked the RRC for a pre-review advising the existing rule and offer suggestions for making it consistent with the RRC's current protocols. Having received those suggestions, the DEMLR staff proposed rule language changes and received EMC approval to take those changes to public notice and hearing.

A public hearing was held in Raleigh, North Carolina on May 22, 2018, to hear public comments on proposed Readoption of a Permanent Rule with Amendments in 15A NCAC 02K .0212. Although no members of the public attended the hearing, the hearing officer's prepared presentation was entered into the record and is presented below.

B. Hearing Officer's Presentation (*Transcript of Mr. DeVane's Presentation*)

Hello, I am Boyd DeVane and I work in the Division of Energy, Mineral, and Land Resources. Because of the Regulatory Reform Act of 2013, we were required to review all our rules. The major requirement of the regulatory review process is to categorize them into one of three categories. In September of 2016, the DEMLR staff brought to the Environmental Management Commission their proposed categorization of the Dam Safety rules which was to put 31 of the 33 rules in the "necessary without substantive public interest" category and two as "unnecessary."

The staff's initial categorizations or "initial determinations" were sent to public notice for 60 days. The results were as we had hoped. No one objected to any of the proposed categorizations of the existing EMC rules. However, we did receive one comment on the need for a reference correction. The comment was that a reference in rule 2K .0212 to G.S. 143-215.25 needed to be updated because two obsolete definitions in the statute were removed many years ago which caused a need to change the reference in the Dam Safety rule. The meaning of the rule was not changed, only the statutory reference number.

The referenced Dam Safety statute had once included four definitions and the Commission's rule referenced the 4th one. But, later, the legislature repealed the middle two definitions, meaning the reference to paragraph (4) should be changed to paragraph (2).

At their October 19, 2017 meeting, the Rules Review Commission concluded that the note on the out-of-date reference should be considered an “objection” and that the rule should now be classified as “necessary with substantive public interest.” This meant that the EMC must go through the rule-making process, including public involvement. The staff recommended to the EMC that they go ahead and schedule a public hearing to expedite the process in case someone was to call for a hearing.

You will see on the handout, “Proposed Changes to NCAC 02K .0212”, that several other changes are included in addition to the one outdated reference. Most of these are changes that the Rules Review Commission staff lawyers recommended to make them more consistent with the Administrative Procedure Act – which did not exist when these rules were adopted. We also had to prepare a Fiscal Impact Analysis. The Analysis has been approved by the Office of State Budget and Management as having “no substantial economic impact.”

Today, we are asking for your comments. We also will be seeking written comments that you or anyone has regarding the proposed rule changes. We will accept comments until July 2, 2018. They can be submitted to me at 1612 Mail Service Center, Raleigh, NC 27699-1612 or email them to boyd.devane@ncdenr.gov.

We do appreciate your participation in this process. We will now open the floor for comments.

C. Public Comments and Responses

There were no comments received during the comment period and there is no transcript of the public hearing (except for Mr. DeVane’s presentation) as there were not any members of the public in attendance.

D. Conclusion


There were no comments during the public hearing or otherwise during the 60-day comment period. Therefore, no change to the proposed rule is recommended.

E. Hearing Officer’s Recommendations

The Hearing Officer recommends that the proposed changes to rule 15A NCAC 02K .0212 as presented to the public in the North Carolina Register on May 1, 2018, be adopted by the Environmental Management Commission.

II. Support Information

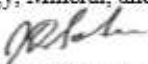
A. Designation of Hearing Officer Memo

	ENVIRONMENTAL MANAGEMENT COMMISSION	John D. Solomon Chairman
	NORTH CAROLINA	Julie A. Wilsey Vice Chairman
	DEPARTMENT OF ENVIRONMENTAL QUALITY	
Roy Cooper, Governor Michael S. Regan, Secretary	David W. Anderson Gerard P. Carroll Charles Carter Marion Deerpake Charles B. Elam Mitch Gillespie Steve Keen	Dr. Suzanne Lazorick Dr. Stan Meiburg Manning Puette Dr. Albert R. Rubin Clyde E. Smith, Jr. Richard Whisnant

March 15, 2018

MEMORANDUM

To: Boyd DeVane
Division of Energy, Mineral, and Land Resources

From: John D. Solomon 
Chairman of Environmental Management Commission

Subject: Hearing Officer Appointment

A public hearing has been scheduled for Tuesday, May 22, 2018, at 3:00 p.m. in the Ground Floor Conference Room, Archdale Building, 512 N. Salisbury St., Raleigh. The purpose of this hearing is to gather comments on proposed amendments to 15A NCAC 02K .0212 of the Dam Safety rules.

I am hereby appointing you to serve as hearing officer for this hearing. Please receive all relevant public comment and report your findings and recommendations to the Environmental Management Commission.

JDS/bd

Attachment

cc: Lois Thomas
Hearing Record

State of North Carolina | Environmental Quality
1611 Mail Service Center | Raleigh, North Carolina 27699-1611
919-707-9023

An Equal Opportunity Affirmative Action Employer

B. Public Notice

NOTICE OF TEXT

NC Register
May 18, 2018

Notice is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the Environmental Management Commission intends to readopt with substantive changes the rule cited as 15A NCAC 02K .0212.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://deq.nc.gov/permits-regulations/rules-regulations/rules-regulations/proposed-rules>

Proposed Effective Date: November 1, 2018

Public Hearing:

Date: May 22, 2018

Time: 3:00 p.m.

Location: Ground floor conference room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604

Reason for Proposed Action: *In the statutorily-required, Periodic Review of Existing Rules, the "initial determination" of the 33 Dam Safety rules in 15A NCAC Subchapter 02K were approved for finalization by the Environmental Management Commission (EMC) at their May 2017 meeting. Although no one objected to the categorization of these rules, we did receive one comment on 15A NCAC 02K .0212 stating that: "The reference to G.S. 143-215.25(4) should be G.S. 143-215.25(2)." The Rules Review Commission (RRC), in October of last year, determined that the comment received was an "objection" and they re-categorized this rule as "necessary with substantive public interest." This means that the EMC must re-adopt this rule pursuant to G.S. 150B-21.3A and update the incorrect statutory reference.*

Comments may be submitted to: Boyd DeVane, 1612 Mail Service Center, Raleigh, NC 27699-1612; phone (919) 707-9212; email boyd.devane@ncdenr.gov

Comment period ends: July 2, 2018

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact ($\geq \$1,000,000$)
- ☐ Approved by OSBM
- ☐ No fiscal note required by G.S. 150B-21.4
- ☒ No fiscal note required by G.S. 150B-21.3A(d)(2)

C. Proposed Rule Changes

COPY OF PROPOSED RULE

NC Register
May 18, 2018

15A NCAC 02K .0212 ADDITIONAL DESIGN REQUIREMENTS

(a) All elements of the dam and reservoir shall conform to ~~good engineering practice.~~ generally accepted engineering standards. The safety factors, design standards, and design references that are used shall be included with the final design ~~report.~~ report and the plans and specifications as set forth in Rule .0201 of this Section.

(b) Monitoring or inspection devices may be required by the Director for use by inspectors or owners in the inspection during construction and filling and after completion of ~~construction.~~ construction if the Director determines that these measures are needed to carry out the purposes of the Dam Safety Law of 1967. The Director ~~may~~ shall also require that ~~such~~ monitoring or inspection devices, ~~existing or installed by requirement,~~ devices be read observed and the information recorded documented at specified intervals and that copies of such be forwarded to his office, and made available to the Department.

(c) The plans, construction schedule, and construction specification shall ~~assure~~ also contain the elements necessary to achieve the conditions specified in G.S. 143-215.31(b), that the downstream flow satisfies minimum quality and quantity standards as defined in G.S. 143-215.25(4) during the period of construction, filling, and life of the dam and reservoir.

Authority G.S. 143-215.26; 143-215.27; 143-215.31.

D. Fiscal Impact Analysis



FISCAL IMPACT ANALYSIS for

Propose Rule Revision to Dam Safety Rule 02K .0212

01/05/2018 (Approved by OSBM)

A. General Information

Agency: Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (DEMLR)

Rule Title: “Additional Design Requirements”

Citation: 15A NCAC 02K .0212

Rulemaking Authority: GS 143-215.26; GS 143-215.27; GS 143B-282

Staff Contact:

Boyd DeVane, Dam Safety Program, Boyd.devane@ncdenr.gov
(919-707-9212)

Impact Summary:

State government:	None
Local government:	None
Regulated utilities	None
Federal government:	None
Substantial economic impact:	None

B. Purpose of the Rule

The purpose of the existing rule is to make it clear that the Dam Safety program in DEMLR has authority to require monitoring and reporting when deemed necessary.

C. Why are we Seeking this Rule Change?

In the statutorily-required, Periodic Rules Review process, the “initial determination” or “categorization” of the 33 Dam Safety rules in 15A NCAC Subchapter 2K were sent out to public notice and approved for finalization by the EMC at their May 2017 meeting. The “categorization” included a recommendation that two of the 33 rules be categorized as “unnecessary” and the others categorized as “necessary without substantive public interest.” Although no one objected to the categorization of these rules, we did receive one comment on

15A NCAC .0212 stating that: “**The reference to G.S. 143-215.25(4) should be G.S. 143-215.25(2).**”

Paragraphs (2) and (3) of the statute had been deleted by the General Assembly in 1993 which left the Commission’s rule language inaccurate. The DEMLR staff agreed with the need to make this correction and had planned to do that at the next time we took the Dam Safety rules out for public review. However, in considering the Environmental Management Commission’s recommendations regarding the Dam Safety rules determinations, the Rules Review Commission (RRC), in October of 2017, determined that the comment received was an “objection” and they re-categorized this rule as “necessary with substantive public interest.” This means that the EMC must re-adopt this rule pursuant to G.S. 150B-21.3A and update the incorrect statutory reference. Because the entire rule will be reviewed by the RRC, we asked the staff of the of the RRC to review the existing rule and offer suggestions for making it consistent with the RRC’s current protocols. Having received those suggestions, the DEMLR staff has proposed rule language changes and will be taking the changes to the Environmental Management Commission in March 2018 with a request that the rule revisions be sent to public notice and hearing. (See “PROPOSED CHANGES TO NCAC 02K .0212” at the bottom of page 4.)

D. Summary of the Proposed Rule Changes and Indication of Fiscal Impact

Paragraph (a) changes

(a) All elements of the dam and reservoir shall conform to ~~good engineering practice~~ generally accepted engineering standards. The safety factors, design standards, and design references that are used shall be included with the final design report and the plans and specifications as set forth in Rule .0201 of this Section

In paragraph (a), the term “good engineering practice” is proposed to be replaced by “generally accepted engineering standards.” The RRC suggested that “good engineering practice” was not clearly defined so the DEMLR staff suggested replacing that term with “generally accepted engineering standards” since the “generally accepted” term is used in the Dam Safety Law. This clarification should have no impact on the implementation of the Dam Safety Law nor any fiscal impact on the regulated entities.

Also in paragraph (a), the phrase “and the plans and specifications as set forth in Rule .0201 of this Section” was added to help explain where the “final design report” requirement originated. The RRC pointed out that the existing language did not make it clear what the report was nor who submitted it, so adding the Rule .0201 reference addressed their concerns. We see no fiscal nor regulatory impact in this change.

Paragraph (b) changes

(b) Monitoring or inspection devices may be required by the Director for use by inspectors or owners in the inspection during construction and filling and after completion of construction if the Director determines that these measures are needed to carry out the purposes of the Dam Safety Law of 1967. The Director ~~may~~ shall also require that ~~such~~ monitoring or inspection devices, ~~existing or installed by requirement,~~ be read observed and the information recorded ~~documented at specified intervals and that copies of such be forwarded to his office and made available to the Department.~~

In paragraph (b), the phrase “if the Director determines that these measures are needed to carry out the purposes of the Dam Safety Law of 1967” was added to address a concern by the RRC. The RRC noted that there had to be some criteria for the Director to use to determine when the installation of “Monitoring and Inspection” devices can be required. They explained that he or she can’t just be arbitrary in making those requests.

The RRC staff also noted, in the second sentence of (b), that “may” should be replaced with “shall” because if the Director requires these devices, specifications on dealing with the information collected is also a requirement and not an option.

The RRC staff also noted that use of the term “existing or installed” was inconsistent with a design requirement for a proposed project. We removed the term since it is clear in other parts of the statute that additional devices can be required on an existing project.

Another change in paragraph (b) was the modification of the requirement that the devices must be “read and documented at specified intervals and that copies of such be forwarded to his office”. The RRC wanted more explanation of what “documented” and “specified intervals” meant. The DEMLR staff concluded that the detail was not necessary here since the statutes give DEMLR flexibility to require these provisions. The requirement for “forwarding copies” was a suggestion by DEMLR staff to allow other methods of providing monitoring information other than forwarding paper copies.

Since the Division still has authority to require any of the provisions initially specified in the present rule, we concluded that there should be no regulatory nor fiscal impact of the changes.

Paragraph (c) changes

(c) The plans, construction schedule, and construction specification shall ~~assure also contain the elements necessary to achieve the conditions specified in G.S. 143-215.31(b). that the downstream flow satisfies minimum quality and quantity standards as defined in G.S. 143-215.25(4) during the period of construction, filling, and life of the dam and reservoir.~~

Paragraph (c) was modified because G.S. 143-215.25 had paragraphs (2) and (3) removed in the 1993 session of the General Assembly so the reference to paragraph (4) was no longer valid. Also, upon closer evaluation, it was noted that the description of protecting water quality standards in that sub-chapter was not as clear as another subchapter in the Dam Safety Law, G.S. 143-215.31(b). It was concluded that subchapter 215.31(b) better described the requirements of protecting water quality standards and habitats. Therefore, the reference was changed. We see no change in the meaning of paragraph (c) nor any change in the way the water quality standards are protected. Therefore, we see no regulatory or fiscal impact of this wording change.

E. How will the Changes Affect Environmental Protection?

We see no impact on the way the Dam Safety program will be implemented although the rules are more clearly presented than before.

F. What are the alternatives?

Without these technical corrections, we understand that the rule will be repealed by the RRC.

G. What Will Be the Costs Resulting from the Change?

- **To state government** – Since we believe that the program’s implementation will not change by these modifications, we see no additional costs from these changes.
- **To local governments** – Since we believe that the program’s implementation will not change by these modifications, we see no additional costs to local governments
- **To federal government** - Since we believe that the program’s implementation will not change by these modifications, we see no additional costs to the federal government.
- **To regulated entities** - Since we believe that the program’s implementation will not change by these modifications, we see no additional costs to the regulated entities.